SUPREME COURT, U. S.
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No. 198

IN THE

SUPREME COURT OF THE UNITED STATES

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Petitioner*

vs.

R. B. PITTMAN, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EASTLAND, TEXAS

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Gulf, Colorado and Santa Fe Railway Company, petitioner herein, prays that a writ of certiorari be issued to review the final decree of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland, Texas, which reversed the judgment of the Trial Court of the State of Texas.

I

REPORTS OF THE OPINION OF THE COURTS BELOW

The Trial Court on motion of petitioner entered judgment that respondent take nothing in his suit

against petitioner under the Federal Employers' Liability Act (45 U.S.C.A., Sections 51-59) and the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas reversed this judgment. The opinion of the Court of Civil Appeals is attached hereto as Appendix "A" and is reported in 338 S.W. 2d 774. The order of the Court of Civil Appeals denying the motion for rehearing of petitioner is attached hereto as Appendix "B" and is not reported. The order of the Supreme Court of Texas refusing, no reversible error, the application for writ of error of petitioner is attached hereto as Appendix "C" and is not reported. The order of the Supreme Court of Texas overruling the motion for rehearing of petitioner is attached hereto as Appendix "D" and is not reported.

II

JURISDICTION

1. The final judgment of the Court of Civil Appeals of Texas was entered on September 23, 1960 and is attached hereto as Appendix "E." The order overruling petitioner's motion for rehearing in the Court of Civil Appeals was entered by the Court of Civil Appeals on October 14, 1960.

2. Jurisdiction to review the judgment of the Court of Civil Appeals is conferred on this Court by 28 U.S.C.A. 1257 (3) (June 25, 1948, C. 646, 62 Stat. 929).

3. The statutes of the United States applied by the Court of Civil Appeals of Texas are 45 U.S.C.A., Sec-

tions 51-59 (35 Stat. 65, as amended; 36 Stat. 291 and 53 Stat. 1404).

4. The Court of Civil Appeals is the highest Court of the State of Texas in which a decision could be had within the meaning of 28 U.S.C.A. 1257. Application for writ of error to the Supreme Court of Texas was refused, no reversible error ,on March 15, 1961 and motion for rehearing was overruled by the Supreme Court of Texas on April 12, 1961.

III

QUESTIONS PRESENTED

The error of the Texas Court of Civil Appeals in reversing the judgment of the Trial Court and in holding that there was sufficient evidence of negligence presented by respondent to submit the case to a jury under the Federal Employers' Liability Act.

IV

STATEMENT OF THE CASE

This is a suit for personal injuries filed by respondent, R. B. Pittman, against the petitioner, Gulf, Colorado and Santa Fe Railway Company, in the State District Court at Brownwood, Texas under the Federal Employers' Liability Act. At the conclusion of respondent's evidence the trial judge felt that no evidence of negligence and proximate cause had been presented by respondent and the Trial Court granted the motion for instructed verdict presented by petitioner. On appeal to the Court of Civil Appeals at Eastland, Texas, that Court reversed the judgment of

the Trial Court and remanded the case to the Trial Court for a new trial.

The facts of the accident are simple and the issue before this Court is simple. The respondent at the time of the accident was tightening a small bolt with an ordinary hand box wrench when the wrench slipped off the bolt causing respondent to sit down on the ground and hurt his back. This same bolt had been loosened minutes earlier with the same wrench by Anderson, a fellow employee who testified in this trial for the respondent, and nothing was wrong with the bolt at that time according to Anderson himself. The only testimony as to what caused the accident is that of respondent who testified that the head of the bolt, which had six corners, rounded off causing the wrench to slip. The bolt did not break but a corner or corners simply rounded off so that the wrench slipped around the bolt. There is no testimony that the petitioner knew or should have known that the bolt was going to round off. In fact the testimony of respondent himself (and this will later be quoted) was that the petitioner could not have possibly known that the bolt would round off. If this is so, then there can be no negligence on the part of petitioner because petitioner didn't do anything to cause the accident, and furthermore petitioner could not have done anything to prevent the accident.

Respondent went to trial on his original petition (Tr. 2) in which he alleged only the following grounds of negligence:

"1. In failing to replace the defective nut after

it was removed from the defendant's equipment.

"2. In failing to warn the plaintiff of the defective condition of the nut which he was tightening when injured.

"3. In failing to furnish the plaintiff with a safe place in which to work."

The Trial Court agreed with the petitioner that it was entitled to judgment as a matter of law. The motion for instructed verdict is found at page 12 of the Transcript and sets up, among others, the following as grounds for such instructed verdict:

1. The evidence fails to raise a fact issue as to any of the three alleged grounds of negligence.

2. The evidence fails to raise a fact issue as to proximate cause.

3. The evidence shows as a matter of law that any injuries sustained by respondent were the result of an unavoidable accident.

4. The evidence shows as a matter of law that respondent was guilty of contributory negligence which was the sole proximate cause of the alleged injuries.

The decision of this case must stand or fall on whether the Trial Court was warranted in granting the motion of petitioner based on any ground set out in such motion. In this respect, respondent is bound by the grounds of negligence set out in his petition.

The respondent was an experienced mechanic who had worked for the petitioner as a machinist for

nearly 20 years (S.F. 43 and 44). The type of bolts in question was not new to respondent, as he had seen them before (S.F. 58), and in fact had on other occasions tightened identical bolts on the same type of steam fittings (S.F. 19).

The first witness of respondent was J. G. Anderson, a Santa Fe employee, who is an experienced pipe fitter with 15 years experience (S.F. 3). Mr. Anderson testified that the place where the respondent was tightening the bolt was 12 to 18 inches off the ground (S.F. 22), that the bolt was easily accessible (S.F. 22), that there was nothing unsafe about the place where the respondent was working (S.F. 33), and that there was nothing such as oil or grease that caused respondent to slip (S.F. 34).

Mr. Anderson had taken the steam fitting apart to replace a gasket just prior to the accident and had a few minutes earlier loosened the same bolt that respondent was tightening. At the time of the accident he had replaced the gasket and was in the process of putting the coupling back together (S.F. 8). He further testified that you have to put more pressure on the bolts to loosen them than you do in tightening them (S.F. 27), and that he had not had trouble when he unscrewed these identical bolts with the identical wrench a few minutes before the accident in question (S.F. 24 and 25). The wrench did not slip on the bolts when he unscrewed them *and there was nothing defective about that bolt when he loosened it earlier that night* (S.F. 27). This is the testimony of the respondent's own witness.

Mr. Anderson did testify that the wrench slipped off the bolt causing respondent to sit down, but his explanation of what caused the accident was, "Well, it slipped off some way or another," (S.F. 10). Anderson also testified that respondent did not mention that he had hurt his back until several hours after the accident (S.F. 33), and respondent did not mention to him that he was claiming that the bolt rounded off until after the lawsuit was filed over a year after the accident (S.F. 34 and 35).

There is absolutely no evidence in the record that petitioner knew that the bolt was in any way defective or that it should have known that the bolt was defective. In fact, the testimony of respondent himself was that there was no way for petitioner to discover that this bolt was going to round off as he claims it did. We quote from the respondent's testimony at pages 158-160 of the Statement of Facts, as follows:

> "Q. I believe you stated that the cause of the accident was the nut sloughing off, is that correct?
>
> "A. That's right.
>
> "Q. I believe you said that it sloughed off because it was rusty; is that the reason it sloughed off?
>
> "A. That's the way it looked like it was.
>
> "Q. Sir?
>
> "A. Yes, sir, that would cause it.
>
> "Q. Can you look at a nut and tell that it is rusted, and, therefore, there is some danger in putting pressure on it?
>
> "A. Well, if they're bad enough you can tell

whether there's danger in it.

"Q. You say this one sloughed off, did you not?

"A. Yes, sir.

"Q. So in your opinion it was bad enough?

"A. Yes, sir.

"Q. You are telling the jury that you could look at a nut that was in that condition, and could tell from its rusted condition that it was dangerous for anyone to put a wrench on it and put some pressure on it?

"A. It's owning to how much pressure you're going to put on it.

"Q. Well, the amount of pressure that you would have to put on to tighten it up, this particular nut, on this particular morning?

"A. *I don't believe anybody could tell whether —how much it would stand.*

"Q. You think, then, that a person could look at a nut, and where it had the 6 corners on it—this was a 6 cornered nut, was it not?

"A. I believe that's right; I believe that's what they had.

"Q. Even though it was rusted you could look at it and tell it was rusted as most bolts are that are on equipment of that type, are they not; most of them are rusted to some extent, are they not?

'A. On that special equipment?

"Q. Yes, on all equipment on an engine?

'A. Well, yeh, in places they are.

"Q. *So that it is your testimony that you or anyone else could not look at that nut and tell from its rusted condition that there was some danger in someone trying to tighten that nut?*

"A. *Well that particular nut I don't believe you could.*" (Italics ours)

The respondent did not take the position that the condition of the bolt should have been discovered and replaced by petitioner so as to avoid the accident. In fact respondent affirmatively testified that petitioner wouldn't have had any reason to know that the bolt was dangerous until after the accident had happened. We quote the following testimony of respondent from pages 187-188 of the Statement of Facts, wherein he testified that petitioner should have replaced the bolt *after* the accident and not before the accident as follows (counsel for petitioner is reading from a deposition of respondent and respondent is agreeing that the statements made in the deposition are correct):

> "Q. All right. I will read beginning on page 71; I asked you this question, if you will follow on it. 'Q. In failing to replace the defective nut after it was removed from the defendant's equipment, just what do you mean by that? A. Well, it should have been removed. Q. Who should have removed it? A. Buck Anderson. Q. When? A. That night. Q. When that night? A. *Well, after I got hurt.*' Is that what you said.
>
> "A. Yes, sir.
>
> "Q. All right. Then I asked you this question on page 73. 'Q. *When was it that you say someone should have removed the nut and put another one on there; when should that have been done?* A. *Well, it should have been done after I got hurt.* Q. After you got hurt; and it was not removed? A. No, sir. Q. And -- A. Not here it wasn't. Q. *There would have been no occasion for anyone to remove it before you got hurt, would there?* A. *No, sir.* Q. *In other words, no one would have had any occasion, or reason, or ability to*

discover that it should have been removed prior to the time that you got hurt? A. *No, sir'* Is that correct?

"A. That's right." (Italics ours)

V

REASONS FOR GRANTING THE WRIT

This petition for writ of certiorari should be granted so that the courts of this country will know that this Court still holds that the plaintiff in an FELA case must prove some act of negligence on the part of the defendant before he is entitled to have the case submitted to a jury. The respondent in this case has simply proven that an accident occurred and this Court has held many times that this is not sufficient to go to a jury. We respectfully submit that this case is controlled by the decisions of this Court in *Herdman vs. Pennsylvania Ry. Co.*, 352 U.S. 518, 77 S.Ct. 455, 1 L.Ed. 2d 508, *Inman vs. Baltimore & O.R. Co.*, 361 U.S. 138, 80 S.Ct. 242, 4 L.Ed. 2d 198, and *New York, New Haven & Hartford R.R. Co. vs. Henagan*, ... U.S. ...., 5 L.Ed. 2d 183, 81 S.Ct. .....

In *Inman vs. Baltimore & O.R. Co.*, supra, this Court in affirming a reversal of a trial court judgment for plaintiff in an FELA case said:

> "The Act does not make the employer an insurer.
>
> . . .
>
> "The burden of proving that the crossing was an unsafe place to work was on petitioner (plaintiff). It depended on some type of testimony showing the hazards at the crossing. . . ."

In *New York, New Haven & Hartford R. R. Co. vs. Henagan*, supra, this Court held that the proof was insufficient to submit to the jury the question of whether employer negligence played a part in the emergency application of the brakes which allegedly produced the plaintiff's injuries.

We respectfully submit that the record in the case before the Court can be searched from beginning to end and no evidence can be found showing that the petitioner played a part in the accident which brought about the injuries to respondent.

It is very difficult in an appeal of this type to point out evidence that is not in the record. The only way we can attempt to do this is to cover the evidence that respondent has previously argued would raise a fact issue on negligence and proximate cause and to cover the evidence recited in the opinion of the Court of Civil Appeals. We shall cover them in that order, beginning with the allegations of negligence by respondent.

The first two allegations of negligence were as follows:

> "1. In failing to replace the defective nut after it was removed from the defendant's equipment.
>
> "2. In failing to warn the plaintiff of the defective condition of the nut which he was tightening when injured."

These two allegations of negligence are so closely related that we shall discuss them jointly. In both

cases, they assume that the bolt was defective and this the respondent had the burden of proving.

While respondent testified to the conclusion that the wrench slipped off the bolt because the corners of the bolt rounded off, the conclusive testimony of both respondent and his own witness Anderson was that the accident did not occur in this manner. The wrench in question has many grooves and each of the six corners of the bolt fits into one of these grooves. Both respondent and Anderson testified that all six corners of the bolt would have to round off before the wrench would slip off the bolt, because the other corners would keep the wrench from turning (S.F. 42, 163, 164 and 194). Respondent's attorney well realized the significance of this testimony and questioned respondent further about this matter on page 194 of the Statement of Facts, but respondent stuck with his statement. The reason that respondent's attorney was so unhappy with this admission of his client was the testimony of Mr. Anderson that not only had he taken the same bolt off with the same wrench prior to the accident, but that *following the accident he used the same wrench to finish tightening the same bolt, since respondent had not gotten it completely tight* (S.F. 32). This testimony shows without a doubt that the corners did not round off, because Anderson could not have been tightening the bolt with this wrench if they had rounded off.

However, for the purposes of argument, we shall assume that he did prove that the corners rounded off. In addition to this, he must prove that petitioner

knew that the bolt was going to round off or should have known that the bolt was going to round off before petitioner would have been under a duty either to replace the nut or to warn respondent of the condition of the nut. See *A.T.&S.F. Railway Co. vs. Wyer*, 8th Cir., 8 F. 2d 30; *Madison vs. Phillips Petroleum Co.*, 5th Cir., 88 F. 2d 515; *Bassett vs. New York, Chicago & St. Louis Railroad Co.*, Third Cir., 235 F. 2d 900; *Texas & Pacific Railway Co. vs. Jones* (Tex. Civ. App., Wr. er. ref.) 198 S.W. 598; *Oliniski vs. New York Central Railroad Co.*, 162 F. Sup. 23; and *DeLoache vs. Newton* (Tex. Civ. App., no writ hist.) 284 S.W. 2d 242.

In *Oliniski vs. New York Central Railroad Co.*, supra, plaintiff employee of defendant railroad was injured when a cord on a mail sack broke while he was lifting the sack by holding the cord. The trial court entered a judgment for defendant and, in its opinion, emphasized that there was no evidence that the railroad should have inspected the cord or, if it had inspected the cord, would have discovered that the break would occur.

In *DeLoache vs. Newton*, supra, the plaintiff was injured when a bolt in a pipe dog used to hold two inch pipe broke. The court held that the pipe dog was a simple tool in common use and that the duty of an employer to furnish safe tools and appliances did not apply to such simple tools or appliances. In this case, also, the plaintiff admitted that an examination of the pipe dog would not have revealed that the bolt was worn. The defect, therefore, being latent, the court

held that the defendant employer was not liable and quoted the following rule:

> " 'A master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant and which could not be discovered in the exercise of reasonable care and diligence.' 56 C.J.S., Master and Servant, Sec. 247, p. 1002; Southwestern Telegraph & Telephone Co. v. Tucker, 102 Tex. 224, 114 S.W. 790; Texas & N. O. R. Co. v. Sarver, Tex. Civ. App., 113 S.W. 2d 317, writ refused."

In *A. T. & S. F. Railway Co. vs. Wyer*, supra, the following principles were recognized with regard to the duty of a railroad toward its employees:

> 1. There is no duty to warn where the employee possesses sufficient knowledge of the conditions to enable him to take appropriate precautions to safeguard himself.
>
> 2. An employer can not be liable for failure to warn unless the employer knew of something to warn about or should have known of something to warn about.

In *Texas & Pacific Railway Co. vs. Jones*, supra, plaintiff was injured when the head of a spike which he was removing from a bridge broke off, causing him to fall off of the bridge. Plaintiff alleged negligence on the part of the railroad in failing to warn plaintiff of the faulty and dangerous condition of said spike. The court held that an instructed verdict should have been entered for defendant, saying that defendant had no duty to inspect the spike, as follows:

> "There was testimony that the spike had been

> used before it was used in repairing the bridge, about four months prior to the time appellee was injured, but none other that it was defective when used in repairing same. We think that testimony did not authorize an inference that the spike was unfit for use in repairing the bridge and that appellant knew it at the time it directed appellee to pull it. If therefore appellant should have been held to have then had knowledge of the defect in the spike, it was because it was its duty to have inspected it before directing appellee to pull it. We have been referred to and have found no authority supporting the contention made that appellant owed such a duty to appellee. It would be as reasonable, it seems to us to say that the owner of a house must inspect nails holding boards constituting the roof thereof and warn a carpenter who undertook to tear it away of defects in the nails, as to say appellant owed to appellee a duty to discover defects in the spikes before directing him to pull them. . . ."

We specifically refer the Court to the testimony of the respondent himself, quoted in the statement above from pages 158 through 160, and 187 through 188 of the Statement of Facts, where respondent specifically admits *that you could not tell from an inspection of the bolt that the corners would not withstand the pressure and that there was no occasion or reason for Anderson or anyone else to replace the bolt until after the accident occurred.* The rule is well established that a party to a cause of action is bound by his own admission in testifying at the trial and this rule has been recognized in FELA cases such as *Barnett vs. Terminal Railroad Association of St. Louis*, 8th Cir.

228 F. 2d 756, where the Court said:

> "Where a party's own testimony, if true, would defeat his right to a verdict, and such statements are not modified or explained, a verdict may be directed against him. Harlow v. Leclair, 82 N.H. 506, 136 A. 128, 50 A.L.R. 1124; Mandell v. Doge-Freedman Poultry Co., 94 N.H. 1, 45 A. 2d 577, 163 A.L.R. 1370. . . ."

We do not believe that the law impose a duty on an employer to inspect such simple devices as a bolt, but if it did, what kind of inspection should have been made? The petitioner in this case not only had an employee who had looked at the bolt shortly before the accident, but this employee had actually used a greater amount of pressure on the bolt than that used by respondent. The bolt was adequate on such occasion, and Anderson had no reason to believe that it would not be adequate when a lesser amount of pressure was applied to the bolt. What better kind of inspection could petitioner have made to discover whether the bolt was defective?

The third and last allegation of negligence was as follows:

> "3. In failing to furnish the plaintiff with a safe place in which to work."

There was no evidence that petitioner failed to furnish the respondent with a safe place to work and, in fact, the evidence of respondent himself was that he was furnished a safe place to work.

We have read respondent's brief in the Court of

Civil Appeals carefully, and find that respondent argues that he was not furnished a safe place to work only in three respects, as follows:

1. The bolt was not replaced.
2. He was not warned that the bolt was defective.
3. He was required to work in the dark with a flashlight without an opportunity to inspect the bolt.

The first two are covered by the other two alleged grounds of negligence which we have discussed, so that only the defective lighting remains.

There is absolutely no evidence in this record even inimating that the lighting was insufficient or that the condition of the lighting in any way entered into or caused this accident. If respondent says that he was not furnished adequate lighting and this inadequacy caused the accident, then he has the burden of pleading and proving such facts. Not only did he not do so, but his own witness, Anderson, testified that the foreman, Mr. Harrison, was holding a flashlight on the bolt (S.F. 28), that there was nothing unsafe about the place where they were working (S.F. 33) and that there was nothing such as oil or grease that caused respondent to slip and fall (S.F. 34). In addition, counsel for petitioner specifically asked respondent about the lighting as follows at page 154 of the Statement of Facts:

> "Q. There was ample lighting there where you could see what you were doing, was there not?
>
> "A. Well, there was a light there.

"Q. There is a floodlight in that area, and then the foreman had a flashlight or a lamp of some kind there shining on the work, is that not correct?

"A. Flashlight.

"Q. There is no difficulty in getting down to where this bolt was that you were to tighten, was there?

"A. No, sir."

Respondent had ample opportunity to testify that the lack of lighting had in some way caused the accident, but in addition to the above, the respondent himself testified in response to a question by counsel for petitioner that the place was safe, as follows (S.F. 154):

"Q. All right, sir. On this accident that is the basis of this law suit that you are suing the Santa Fe on now, there was nothing unsafe about the area where this accident occurred at all, was there?

"A. No, sir."

Respondent himself further negatived any lack of lighting or any other act as a cause of the accident except the rounding off of the bolt in the following answer in response to a question from counsel for respondent (S.F. 186):

"Q. There was nothing defective about this wrench in any way, was there, Mr. Pittman?

"A. No, sir.

"Q. The only thing that caused the accident in any way was the sloughing off of that nut?

"A. Yes, sir."

Respondent can not expect to go to a jury simply on his allegation and his counsel's statement that he was not furnished a safe place to work. Respondent not only failed to prove failure on the part of petitioner to furnish a safe place to work, but, in fact, himself testified and proved by other witnesses, that he was furnished a safe place to work in all respects.

We next turn to the evidence recited in the opinion of the Court of Civil Appeals. We are frankly very surprised that the Court of Civil Appeals would rely on the evidence recited in its opinion, and can only conclude that the Court failed to consider whether such evidence proved any of the specific acts of negligence alleged by the respondent. It is not enough for the respondent to prove facts which might constitute negligence; the evidence introduced must prove the acts of negligence alleged by the respondent in his petition.

The Court first quotes from and recites testimony of Mr. Anderson who was a fellow employee of the respondent. He is correctly quoted as testifying that he sometimes did not replace defective bolts. Surely evidence of what an employee sometimes did is not evidence to support any of the three alleged grounds of negligence. The important thing is what Mr. Anderson did with this particular bolt and not what he "sometimes" did or didn't do. Mr. Anderson testified unequivocally that there was nothing defective about this bolt on that particular night, as follows (S.F. 27):

"Q. You have taken one of these connections

off, and put them back on many times, have you not?

"A. Yes, sir.

"Q. You know, as a matter of fact, that it is more difficult to unloosen one of these bolts than it is to actually tighten it back, is that not correct?

"A. Yes, sir.

"Q. Because of the heat that you have had on the bolt?

"A. (WITNESS NODS HEAD)

"Q. As you were taking it off that night, as you were taking it off, and going in that manner, did it in any way slip, go around this bolt in any way at all? (INDICATING)

"A. Not that I remember.

"Q. There was nothing defective about that bolt that you had this wrench down on at all?

"A. Not that I remember, no, sir.

"Q. You would have known it if you had been working on it and it just went around that, would you not?

"A. That's right.

"Q. You could not have taken it off, could you?

"A. That's right."

Next the Court recites testimony of Mr. Anderson to the effect that the leaking steam "could have" gotten on the head of the bolt in question .Once again we emphasize that his testimony was not that it did, but that it "could have." But assuming that the steam did get on the bolt, this evidence does not tend to prove in any way any of the alleged acts of negligence. There was no testimony whatsoever that the steam

on the bolt in any way caused the accident in question. Counsel for respondent attempted to get Mr. Anderson to testify that steam would cause the bolt to become brittle so that it would round off more easily, but Mr. Anderson would not testify to this. Mr. Anderson did testify that the steam would make it harder to *loosen the bolt*. We quote from page 13 of the Statement of Facts as follows:

> "Q. In your work, in your 17 years or more of work there with the Santa Fe, as a steamfitter, do you have occasion from day to day to deal with metal nuts such as the one that Mr. Pittman was working with at the time of his fall?
>
> "A. Yes, sir.
>
> "Q. What effect does the heat and steam have on those nuts?
>
> "A. Well, it has a tendency to gall them, and make them hard to take off and on.
>
> "Q. In other words, when the nut gets heated, and then cools, what effect does that have on the threads, and the ability of the operator to screw it on and off?
>
> "A. It makes it harder to screw.
>
> "Q. What effect does it have on the nut with reference to making it soft or brittle?
>
> "A. Well, I imagine—I don't know.
>
> "Q. All right.
>
> "A. I wouldn't say that."

On redirect examination counsel for respondent once again asked Mr. Anderson if the steam would cause the bolt to become more brittle, and once again he stated that he did not know, as follows (S.F. 39):

> "Q. When you have a leak reported at that

spot, and you have to work on it later with a wrench of this kind, what effect does it have on the bolts, theirselves, that you have to tighten, that portion that you have to tighten?

"A. Well, they—it—when it's exposed, why, it rusts, and—

"Q. All right, it rusts?

"Yes, sir.

"Q. Now, a rusted bolt, is that easier or harder for you to slough off a shoulder.

"A. I don't know.

"Q. You do not know?

"A. (WITNESS SHAKES HEAD)"

The result of this testimony is that the steam could have done only one thing and that is to make the bolt harder to remove. This could not possibly have any bearing on negligence and proximate cause as Anderson *had already loosened the bolt* and at the time of the accident respondent was simply replacing the bolt that Anderson had already removed a few minutes earlier.

The Honorable Court in its opinion next quotes testimony from Anderson to the effect that defective bolts are sometimes not replaced because the bolts are not readily available, and because of the tight schedule they would not have time to go get another bolt. We are frankly confused as to why the Court would quote testimony of this type. There is no testimony at all in this record that Mr. Anderson discovered that the bolt was defective and would have replaced the bolt except for a bolt not being available. Instead the testimony from every witness who testified in this

case was that it was not discovered that the bolt was defective, and in fact the testimony of the respondent himself was that no one could have discovered that the bolt was defective. This testimony quoted from Mr. Anderson might have some significance if there was any testimony that Anderson had discovered that this bolt was defective and that he didn't replace it because one was not available. The definite testimony of Mr. Anderson as quoted above was that the bolt was not defective and that he had placed much more pressure on the bolt a few minutes earlier than respondent did at the time of the accident and the bolt did not break. Perhaps we should quote the following testimony of Mr. Anderson from pages 24 and 25 of the Statement of Facts:

"Q. You had unscrewed those exact identical nuts and bolts?

"A. Yes, sir.

"Q. That evening earlier, had you not?

"A. Yes, sir.

"Q. You had—had they been tight when you had originally unscrewed them?

"A. I don't remember.

"Q. Well, after those nuts and bolts get warm from that steam they are usually a little hard to get out, are they not?

"A. Yes, sir.

"Q. Did you have to get any kind of a leverage, get a pipe to put on the end of this wrench in order to get it out in any way?

"A. No, sir.

"Q. Do you remember whether you were able to do it without tapping it with your hammer

on the end of the wrench to disconnect it?

"A. I don't remember.

"Q. You have no recollection of having any difficulties or troubles loosening those nuts at all, have you?

"A. No, sir."

Surely this evidence of unavailability of new bolts is of no probative value tending to show negligence and proximate cause. Perhaps this testimony would prove that petitioner is negligent in not having bolts more readily available, but that ground of negligence is not alleged, and furthermore we are at a loss to understand how it could have any bearing on proximate cause when the same witness testified that he did not discover that the bolt was defective. Not only did Mr. Anderson not discover that the bolt was in any way defective, but the respondent himself testified that there was no way to discover that the bolt was going to round off. Not only did Mr. Anderson not know that the bolt was defective, but he had every reason to know and believe that the bolt was not defective. The reason that this is true is because he had removed the bolt a few minutes earlier and in doing so had to apply a great deal more pressure to the bolt than was necessary for respondent to apply in replacing the bolt. If the bolt would withstand the pressure that he exerted, then he could safely assume that the bolt would not round off at the time respondent was doing the work at the time of the alleged accident.

In view of this we cannot see how the question of whether another bolt was available could have any

bearing on this lawsuit at all, but in the event it does then we want to call the following testimony of Mr. Anderson to the attention of the Court (S.F. 40-41):

> "Q. I do not think that it makes any difference, because there has been no evidence that there was a bad bolt, but is there or not a storeroom in the depot, itself, that has a table that keeps these nuts and bolts in place?
>
> "A. There is now, but there wasn't then.
>
> "Q. There was not at that time, you are sure about that?
>
> "A. We had the conduits over there, we could have taken the nut out of the conduit.
>
> "Q. That is what you always do anyway, is it not, take it out of another conduit?
>
> "A. Yes, sir.
>
> "Q. So you did have one within 100 feet of the place where you were working that you could have replaced it with if you had any reason or need to, is that correct?
>
> "A. Yes, sir."

The Court in its opinion next recites the testimony of the respondent, Mr. Pittman. The essence of this testimony simply is that the respondent testified that the bolt rounded off, causing him to fall while he was tightening the bolt. The Court also recites testimony to the effect that Pittman testified that the bolts were exposed to steam, but surely the Court cannot rely on this when there is no testimony that the steam in any way caused the bolt corners to round off. We have already called this testimony to the attention of the Court and we shall not repeat.

VI

CONCLUSION

When you consider all the evidence in this case, you end up with simply the testimony of the respondent that the bolt rounded off. We admit that he did testify that the bolt rounded off, causing him to fall and injure himself, and if his is sufficient evidence to raise a fact issue on negligence and proximate cause, then the opinion of the Court of Civil Appeals is correct. If it is not sufficient evidence to go to a jury, then the decision of the Court of Civil Appeals must be reversed.

However, we think the decision of the Court of Civil Appeals is tantamount to a holding that evidence of an accident and injury is sufficient to submit the case to a jury. We do not believe that this Court is willing to hold that an employee has met his burden in an FELA case simply by testifying that the head of an ordinary bolt rounded off while he was tightening the bolt with a small wrench. If this is the law then I think we are paying lip service when we say that a plaintiff has the burden of proving negligence. But in this case the evidence went even further and showed that the petitioner could not have discovered that the bolt was going to round off by the exercise of ordinary care.

We think that this Court will agree that the accident which occurred was a risk that could not be eliminated. The respondent was performing a simple task with simple tools and there was no way that petitioner

could prevent that wrench from occasionally slipping from the bolt. To hold petitioner liable for such an accident that it could not have in any way prevented is to make petitioner an insurer, and it is well settled that the petitioner is not an insurer.

WHEREFORE, PREMISES CONSIDERED, petitioner prays that this Court grant this petition for writ of certiorari and that on final hearing this Court enter judgment reversing the judgment of the Court of Civil Appeals and affirming the judgment of the Trial Court.

Respectively submitted,

LUTHER HUDSON
JOE BRUCE CUNNINGHAM
HUDSON, KELTNER, JORDAN, SMITH & CUNNINGHAM
1313 Continental Life Building
Fort Worth 2, Texas
Attorneys for Petitioner

Of Counsel:

LUTHER HUDSON

I certify that a copy of the foregoing petition for writ of certiorari has been mailed on the ... day of June, 1961 to respondent's attorneys, Scarborough, Black & Tarpley, P. O. Box 356, Abilene, Texas.

Luther Hudson

APPENDIX "A"

IN THE COURT OF CIVIL APPEALS
FOR THE ELEVENTH SUPREME JUDICIAL
DISTRICT OF TEXAS

R. B. Pittman,
Appellant

vs. No. 3560

Gulf, Colorado & Santa Fe Raliway Co.,
Appellee

Appealed from the
District Court of Brown County, Texas

R. B. Pittman filed suit under the provisions of the Federal Employers' Liability Act (45 U.S.C.A., Sec. 51, et seq) seeking to recover damages for personal injuries sustained by him while working for the Gulf, Colorado & Santa Fe Railway Co. Pittman alleged the railroad was guilty of negligence which was a proximate cause of his injury in failing to replace a defective nut after it was removed from defendant's equipment, in failing to warn the plaintiff of the defective condition of the nut, which he was tightening, and in failing to furnish the plaintiff with a safe place to work.

When Pittman rested his case, the court instructed a verdict for the railway company and rendered judgment for the railway company. Pittman has appealed, contending the court erred in instructing a verdict

because there was some evidence of probative force of negligence and proximate cause on the part of the railway company which caused his injuries and resulting damages. Section 51 of the act provides, among other things, that a common carrier shall be liable in damages to any person sustaining an injury while in the course of his employment resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its care, engines, appliances, machinery or other equipment.

"The courts of this state have repeatedly held that it is error to instruct a verdict when the evidence raises any material issue. In passing upon the question of the authority of the trial court to instruct a verdict, as was done in this case, the evidence must be considered most favorably in behalf of the party against whom the verdict is instructed. A peremptory instruction is warranted only when the evidence is such that no other verdict should be rendered. If there is any conflicting evidence in the record of a probative nature, a determination of the issue is for the jury. White v. White, 141 Tex. 328, 172 SW 2d 295; Stevens v. Karr, 119 Tex. 479, 33 SW 2d 725." Air Conditioning, Inc. v. Harrison-Wilson-Pearson, (Sup. Ct.), 253 SW 2d 422.

Pittman was working in the course of his employment as a machinist for Santa Fe at the time of his alleged injury. Anderson, a fellow employee, had a report of a steam leak from a coupling between the engine and a car on a passenger train. The coupling

was described as a 2-1/2 inch pipe with two swing joints and two swivel joints that is connected between the engine and the car. It was also described as a steam conduit. Anderson had dismantled the coupling, replaced a gasket, reassembled it and had all the work done except lifting it back in place and tightening the bolts. The foreman held a flashlight and Pittman was helping Anderson. The bolt that Pittman was attempting to tighten at the time of the alleged injury was described as a cap screw about 2-1/2 inches long that screws into the bottom casting and pulls it up.

Under the Federal Employers' Liability Act the test of what constitutes negligence and proximate cause is to be determined by applicable federal decisions. Under recent decisions by the United States Supreme Court in Federal Employers' Liability Act cases, we are compelled to find there was some evidence of probative value of negligence and proximate cause, when we consider the evidence in the light most favorable to the appellant.

When Anderson was asked if he would have replaced a defective bolt with a new one, he answered, "Well, sometimes we don't." He also testified as follows: that the steam that was leaking could have gotten on the head of the bolt in question; that the exposure of the bolt to the steam causes it to rust and has a tendency to gaul them and make them hard to take off; that "Q—Counsel also asked you about taking off bolts like that, or nuts, or whatever you want to call them, and not replacing them when they were defective; why was it that you did not replace some

of those some of the time? A—Most of the time we were on short time over there on passenger trains, they run on schedule, and we had—we would have to go get one, there's no store department where we can get one at night, it's not open at night. Q—In other words, you are crowded for time to get the passenger train to running again? A—That's right. Q—A lot of times when you just could not make connections, is that not right? A—That's right, would have to delay it."

Pittman testified as follows: that the joints twisted off of the bolt suddenly as he tightened it and he fell backward, injuring his back; that he looked at the bolt after he had fallen and could see "that the jaw had broken off"; that the bolts are exposed to steam when there is a leak in this area; that the corners of the bolt sheared off and caused him to fall.

With facts less favorable to the injured man than we have in the case at bar, the Supreme Court of the United States has held that there was adequate evidence of negligence and proximate cause. See Gibson v. Thompson, 355 US 18, and cases therein cited, and Deen v. Gulf, Colorado & Santa Fe Ry. Co., 353 US 925, 77 S. Ct. 715, 1 L. Ed. 2d 721.

The judgment is reversed and the cause is remanded for a new trial.

ESCO WALTER
ASSOCIATE JUSTICE

September 23, 1960.

APPENDIX "B"

IN THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

R. B. Pittman

vs. No. 3560 — October 14, 1960

Gulf, Colorado & Santa Fe Railway Company

This day came on to be heard Appellee's motion for rehearing and the same, having been duly considered, is hereby overruled.

APPENDIX "C"

IN THE SUPREME COURT OF TEXAS
AUSTIN

* * * * * * * *

March 15, 1961

No. A-8108.

Gulf, Colorado & Santa Fe Railway Company vs. R. B. Pittman	From Brown County, Eleventh District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Eleventh Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicant, Gulf, Colorado & Santa Fe Railway Company, pay all costs incurred on this application.

APPENDIX "D"

IN THE SUPREME COURT OF TEXAS
AUSTIN

* * * * * * * *

April 12, 1961

No. A-8108.

Gulf, Colorado & Santa Fe Railway Company
vs.
R. B. Pittman
} From Brown County, Eleventh District.

Petitioner's motion for rehearing of application for writ of error having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

APPENDIX "E"

IN THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

R. B. Pittman,	From the District Court
vs. No. 3560	of Brown County.
	September 23, 1960
Gulf, Colorado & Santa Fe Railway Company	Opinion by Walter, A. J.

This cause came on to be heard on the transcript of the record and, the same being inspected, it is the opinion of the Court that there was error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be, and the same is hereby, reversed and the cause remanded in accordance with the opinion of this Court. It is further ordered that all costs incurred by reason of this appeal be, and the same are hereby, taxed against Appellee Gulf, Colorado & Santa Fe Railway Company, for which let execution issue, and that this decision be certified below for observance.

Office-Supreme Court, U.S.
FILED
JUL 24 1961
JAMES R. BROWNING, Clerk

No. 198

• • •

IN THE

SUPREME COURT OF THE UNITED STATES

• • •

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Petitioner*

vs.

R. B. PITTMAN, *Respondent*

• • •

REPLY OF R. B. PITTMAN TO PETITION FOR WRIT OF CERTIORARI

• • •

DAVIS SCARBOROUGH
SCARBOROUGH, BLACK & TARPLEY
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Abilene, Texas
Counsel for Respondent,
R. B. PITTMAN

ABILENE PTG. & STATIONERY CO.

No. 198

° ° °

IN THE
SUPREME COURT OF THE UNITED STATES

° ° °

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Petitioner*

vs.

R. B. PITTMAN, *Respondent*

° ° °

REPLY OF R. B. PITTMAN
TO PETITION FOR WRIT OF CERTIORARI

° ° °

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

In reply to the Petition for Writ of Certiorari filed herein, Respondent R. B. Pittman says that same should be denied:

I

This Court, in many recent cases on facts less favorable to the injured man than the facts in the case at bar, has held a jury question was presented: *Gibson vs. Thompson*, 353 U. S. 18, 78 Sup. Ct. 2; *Deen vs. Gulf, Colorado & Santa Fe R. Co.*, 353 U. S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 721; *Smalls vs. Atlantic Coastline Railroad Company*, 348 U. S. 946, 75 S. Ct. 439, 99 L. Ed. 740; *Brown vs. Western Railway of Alabama*, 70 S. Ct. 105, 107; *J. C. Conner vs. J. Turner Butler*, 80 S. Ct. 21; *Thompson vs. Texas & Pacific R. Co.*, 353 U. S. 926, 77 S. Ct. 698, 1 L. Ed. 2d 722; *Harris vs.*

Pennsylvania Railroad Co., 80 S. Ct. 22, *Schulz vs. Pennsylvania Railroad Company*, 76 S. Ct. 608, *Rogers vs. Missouri Pacific Railroad Company*, 352 U. S. 500, 77 S. Ct. 443, 449, 1 L. Ed. 493

II

Respondent was sent out in the dark to do a job in a hurry without having had opportunity to see the equipment dismantled and without having had opportunity to see the defective bolt beforehand and without having been warned of its defective condition. He was attempting to tighten a bolt which had been placed in the equipment by other employees and the head, or nut, on said bolt sloughed off, causing the wrench to be released and respondent to fall backwards injuring himself. There is direct and positive testimony that the bolt was defective and should have been replaced. There is direct and positive testimony that this was a hurry-up job being done in the dark with the use of flashlights. There is direct and positive testimony that there were no new bolts available and that to have replaced this one another would have had to be removed from a conduit. In the case of *O'Neill vs. Baltimore & O. R. Co.*, 348 U. S. 956, 75 S. Ct. 447, 99 L. Ed. 747, this Court held that the fact that the bolt broke was sufficient evidence to raise issues of negligence. In the O'Neil case a new bolt was used. In the case at bar a new bolt was not available and to have replaced this bolt another one would have to be removed from a conduit and time would not permit. Evidence was also ample to raise fact issue on failing to furnish safe place to work.

Atlantic Coastline R. Co. vs. Smalls, 348 U. S. 946, 75 S. Ct. 439, 99 L. Ed. 740.

WHEREFORE, there being ample evidence to raise jury issues, said Petition for Writ of Certiorari is without merit and should be denied.

Respectfully submitted,

DAVIS SCARBOROUGH

SCARBOROUGH, BLACK & TARPLEY
P. O. Box 2[illegible] Fort Worth, Texas

Counsel for Respondent,
R. B. PITTMAN

By Davis Scarborough

I hereby certify that a copy of the above reply has been served upon Luther Hudson and Joe Bruce Cunningham, Hudson, Keltner, Jordan, Smith & Cunningham, 1313 Continental Life Building, Fort Worth 2, Texas, counsel of record for petitioners, by depositing same in the United States mail to said address this 20 day of July, 1961, in accordance with Paragraph 1 of Rule 33 of the Supreme Court Rules.

Davis Scarborough
Attorney For Respondent,
R. B. PITTMAN